

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)
)
 Amendment of Parts 1, 21 and 74 to)
 Enable Multipoint Distribution)
 Service and Instructional)
 Television Fixed Service Licensees)
 To Engage in Fixed Two-Way)
 Transmissions)
)
 Request for Declaratory Ruling on the Use)
 of Digital Modulation by Multipoint)
 Distribution Service and Instructional)
 Television Fixed Service Stations)

MM Docket No. 97-217

File No. RM-9060

To: The Commission

CONSOLIDATED OPPOSITION
TO PETITIONS FOR FURTHER RECONSIDERATION

BellSouth Corporation and BellSouth Wireless Cable, Inc. (collectively, "BellSouth"), by their attorneys and pursuant to Section 1.429(f) of the Commission's Rules, hereby oppose certain arguments raised in petitions for further reconsideration and clarification of the *Report and Order on Reconsideration* in the above-captioned proceeding (the "*Reconsideration Order*").¹

¹ *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions; Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations, Report and Order on Reconsideration*, 14 FCC Rcd 12,764 (1999), as modified in an *Erratum* in this proceeding released September 2, 1999. A summary of the *Reconsideration Order* was published in the Federal Register on November 22, 1999. See 64 FR 63727 (1999). Notice of the filing of the further reconsideration petitions appeared in the Federal Register on January 26, 2000. See 65 FR 4136 (January 26, 2000).

Introduction

As was the case with the Commission's adoption of the landmark *Two-Way Order*,² the further refinements made in the *Reconsideration Order* will help facilitate the development of advanced, digital wireless broadband services to the public. For instance, applications for "major" ITFS changes will be subject to the same streamlined application processes as "minor" ITFS and other two-way applications. The Commission also relaxed the response station notification requirements and adopted procedures for resolving interference complaints.

On further reconsideration, several parties ask the Commission to make additional changes to its rules. Consistent with the policies at the foundation of this proceeding, BellSouth requests that the Commission permit mutually-agreed upon ITFS lease provisions that require the lease to be assigned when the underlying license is assigned, and also demonstrates that ITFS licensees operating in a point-to-point mode should not be afforded protected service areas ("PSAs").³ By contrast, other parties propose rule changes that would undermine the Commission's policies. The National ITFS Association ("NIA"), Catholic Television Network ("CTN") and a consortium of

² *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions; Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations, Report and Order*, 13 FCC Rcd 19,112 (1998).

³ See Petition for Further Reconsideration filed by BellSouth ("BellSouth Petition"). BellSouth also asked the Commission to state in its rules that the channel shifting rules apply to analog systems as well as digital systems. See BellSouth Petition at 15. To the extent language in this section of the BellSouth Petition refers to channel swapping (rather than channel shifting), this was in error.

five ITFS licensees ("ITFS Consortium")⁴ ask the Commission to eliminate rules that permit lessees of MDS and ITFS capacity to file for booster station licenses. CTN asks the Commission to extend interference protection to ITFS receive sites beyond the 35-mile PSA. As discussed below, BellSouth opposes these proposals.⁵

Discussion

I. THE COMMISSION CORRECTLY RESTORED ITS POLICY PERMITTING CAPACITY LESSEES TO APPLY FOR BOOSTER STATION AUTHORIZATIONS.

Partly at BellSouth's urging,⁶ the Commission reinstated its policy permitting lessees of MDS and ITFS capacity to file for high-power booster station licenses and low-power booster station certifications.⁷ In so doing, the Commission considered and rejected arguments from ITFS interests contending that the rule change would undermine the educational nature of the ITFS service and would constitute a reallocation of ITFS spectrum for commercial use, stating that:

⁴ The ITFS Consortium consists of the Archdiocese of Los Angeles Education and Welfare Corporation, Caritas Telecommunications, the Roman Catholic Communications Corporation, the Santa Clara County Office of Education and San Jose State University.

⁵ BellSouth supports a number of the views offered by other petitioners. For example, the Commission should, as proposed by the Petitioners, clarify that when a hub station licensee subchannelizes its authorized channel, the licensee should be permitted to increase the maximum number of response stations that may be operated simultaneously without prior Commission approval so long as the EIRP of those response stations is reduced in proportion to the reduction in operating bandwidth of each subchannel. *See* Petition for Further Reconsideration filed by the Petitioners ("Petitioners Petition") at 9-12. BellSouth also supports the position taken by IPWireless, Inc. ("IPW") requesting the Commission to formally amend its rules to clarify that omnidirectional receive antennas are permissible, so long as such use fully complies with the Commission's interference protection rules. *See* Petition for Reconsideration filed by IPW at 15-17.

⁶ *See* Petition for Reconsideration filed by BellSouth on December 28, 1998 at 10-12.

⁷ *Reconsideration Order* at 12,795.

We believe that we can address both of these concerns by permitting excess-capacity lessees to apply for booster stations on ITFS frequencies with two conditions: (1) the lessee must obtain the written consent of the main station licensee before applying for such a booster; and (2) the lease must contain provisions that require the lessee to offer to assign the booster licenses to the main station licensee for purely nominal consideration upon termination of the lease. This will enable ITFS excess-capacity lessees to benefit from the flexibility and efficiencies of having all of the booster licenses for their systems held by a single entity, but not cause ITFS licensees to risk permanently losing part of their licensed spectrum.⁸

In their petitions for further reconsideration, three parties essentially rehash their concerns and ask the Commission to retreat from this reasoned policy. NIA seeks elimination of the lessee eligibility option on grounds that the second condition set forth in the *Reconsideration Order* "does *not* guarantee that the booster licenses are in fact returned, and could (and probably would) in some instances result in ITFS facilities being permanently licensed to other than main station licensees."⁹ In these circumstances, NIA opines, there would be no educational service obligations.¹⁰ CTN argues that the consensual licensing of booster stations to commercial operators constitutes a "reallocation" of ITFS spectrum and, as similarly argued by NIA, "would apparently eliminate the requirement for instructional use in a booster service area."¹¹ The ITFS Consortium contends that there is no public interest benefit to retaining the lessee eligibility option

⁸ *Id.*

⁹ Petition for Further Reconsideration filed by NIA ("NIA Petition") at 4 (emphasis in original). NIA also points out that certain of the rules are ambiguously written. *Id.* To the extent the rules are not clear, BellSouth suggests that they be clarified as described *infra*.

¹⁰ *Id.* at 5.

¹¹ Petition for Clarification and Further Reconsideration filed by CTN ("CTN Petition") at 4.

and further notes the possibility that booster stations that originate programming can "blanket an area with commercial service on ITFS frequencies."¹² The ITFS Consortium further states that the "dangerous precedent [of] permitting commercial licensing" of ITFS frequencies outweighs the administrative convenience created by lessees holding booster station authorizations.¹³ In making these arguments, none of these parties offers any new justification for the Commission to reconsider its decision.

Notwithstanding the alarmist tone of their pleas, these petitioners ignore the safeguards the Commission adopted to ensure the licensee's control over co-channel booster stations. A lessee can hold booster station licenses only in instances where the station licensee takes two affirmative, voluntary, consensual acts -- provides its written consent permitting the lessee to apply for a booster and contracts for the right of the licensee to acquire the booster license upon termination of the lease. The policy reinstituted by the Commission seeks only to afford licensees and their lessees the flexibility to determine for themselves which of them will be a booster station licensee. Simply put, if a licensee does not wish to have its capacity lessee file for a co-channel booster station license, it can simply withhold its consent.

BellSouth would, however, be willing to support two additional modifications to satisfy these petitioners' concerns, should the Commission deem them necessary. First, BellSouth would agree to a revision of the second condition such that the co-channel booster station license will be assigned *automatically* to the main station licensee, by and upon written notice to the Commission,

¹² Petition for Further Reconsideration filed by the ITFS Consortium at 4.

¹³ *Id.* at 3.

when the lease terminates or expires. This modification would allay the concerns of NIA and CTN regarding the uncertainty associated with an "offer" to assign the booster authorization for nominal consideration.¹⁴ This safeguard should be a requirement of Sections 21.913 and 74.985, as proposed in the attached Appendix A, so that parties do not have to amend existing leases to comply with this condition.¹⁵

Second, BellSouth did not intend for booster station eligibility of lessees to be a means of circumventing the minimum ITFS educational programming requirements. Thus, the Commission should amend Sections 74.931(c) and (d) to make it clear that a lessee licensed on an ITFS booster station must comply with the minimum educational programming requirements for booster stations.¹⁶

In addition to amending the rules to satisfy the concerns of NIA, CTN and the ITFS Consortium, the Commission also should revise the rules to incorporate minor clarifying edits recommended in the BellSouth Petition and the NIA Petition. In the BellSouth Petition, BellSouth observed that the *Reconsideration Order* made only lessees of ITFS capacity eligible for booster station licenses, omitting the inclusion of MDS lessees, and further, that neither Part 21 nor Part

¹⁴ See NIA Petition at 5; CTN Petition at 5, n.4.

¹⁵ See NIA Petition at 5, n.2.

¹⁶ In adopting Sections 74.931(c)(1) and (d)(1), the Commission stated that boosters may satisfy the ITFS educational programming requirements through retransmission of signals from the main ITFS station. *Two-Way Order* at 19,155. BellSouth urges that this policy be incorporated into the text of Sections 74.932(c)(1) and 74.931(d)(1). BellSouth also supports the Petitioners' proposal to permit commercial operators to originate content on the excess capacity of boosters that serve areas where the ITFS licensee does not have an educational mission, subject to the same recapture requirements as apply to main stations. See Petitioners Petition at 13.

74 had been amended to incorporate the Commission's decision in the *Reconsideration Order*.¹⁷ In the NIA Petition, NIA noted that the language permitting "licensees and conditional licensees" to apply for booster station authorizations was ambiguous. The changes set forth in Appendix A should resolve these concerns.

The continued ability of lessees to apply for and hold booster station authorizations will permit a system operator to enjoy the "flexibility and efficiencies" in the booster licensing process envisioned by the Commission, while MDS and ITFS licensees are protected through the requirements of licensee consent and of assignment to the licensee upon lease termination. Accordingly, with the refinements and clarifications discussed above, BellSouth urges the Commission to retain its eligibility rules and allow MDS and ITFS capacity lessees to hold booster station authorizations.

II. THE COMMISSION SHOULD CONTINUE TO LIMIT ITFS RECEIVE SITE PROTECTION TO THE 35-MILE PROTECTED SERVICE AREA.

In the *Reconsideration Order*, in response to arguments of CTN, the Commission confirmed that ITFS receive sites located outside the PSA of the main station would not be entitled to interference protection, stating that "[l]imiting protection to a 35 mile radius provides certainty to cochannel and adjacent channel entities."¹⁸ In the CTN Petition, CTN contends that this policy is "ill-advised" because ITFS is not a "geographically-limited service,"¹⁹ although it concedes that

¹⁷ BellSouth Petition at 14-15.

¹⁸ *Reconsideration Order* at 12,774.

¹⁹ CTN Petition at 6. To support this view, CTN relies on a passage from a 1990 ITFS order where the Commission observed that, at that time, "a protected service area is fundamentally (continued...)

"[t]he use of a PSA provides protection for leased airtime activity and establishes a consistent method to conduct interference analyses for ITFS and MDS systems."²⁰

CTN's argument that ITFS is not a geographically-based service relies on antiquated policies that have been explicitly rejected by the Commission. In reconsidering the very order from which CTN quotes, the Commission changed its policy and granted PSAs to ITFS licensees that lease capacity, specifically concluding that ITFS is in fact a geographically-based service.

The Commission stated that:

In balancing the interests of wireless cable operators and ITFS entities in this proceeding, we are mindful of the need to enhance the ability of wireless cable operations to combine various ITFS, MDS and MMDS channels for the provision of "wireless cable" service, and to facilitate the support which leasing excess capacity affords ITFS licensees. . . . ITFS entities can be deprived of potential revenues if the ITFS entity is unable to lease excess transmission capacity free from harmful interference. In addition, wireless cable operators may be deprived of access to additional channels, free from harmful interference, that may be necessary in order to compete with a cable television company offering 50 or more channels in a particular locality. Therefore, we now decide to provide *area-based protection* from harmful interference to authorized and previously proposed ITFS entities during hours of leasing to "wireless cable" operator [*sic*].²¹

¹⁹(...continued)

incompatible with the specific purpose and unique needs of ITFS." *Id.* at 7 (quoting *Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, Report and Order*, 5 FCC Rcd 6410, 6419 (1990)).

²⁰ *Id.* at 7.

²¹ *Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, Order on Reconsideration*, 69 RR2d 1477, 1482 (1991) (emphasis added). See also *Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, Report and Order*, 77 RR2d 213, 224-225 (1995) (continued...)

Clearly and repeatedly, the Commission has balanced the interests of ITFS licensees and commercial operators and has concluded that the benefits of ITFS can best be achieved through the common, area-based protection of MDS and ITFS stations, to facilitate the development of systems capable of reaching a greater number of students. The Commission has recognized that extending receive site protection to locations beyond the 35-mile PSA could significantly frustrate the ability of other ITFS licensees to provide educational services throughout a geographic area, a finding that rings even more true with the imminent conversion to advanced systems.

If adopted, CTN's proposal would wreak havoc with the orderly processing of applications. To maximize the full benefits of streamlined processing that are the essence of this proceeding, future applicants and Commission staff must be able to analyze potential interference quickly. This task would be made more difficult and more time-consuming if, in addition to analyzing 35-mile PSAs, applicants and Commission staff also must review every ITFS application to determine whether and to what extent, as suggested by CTN, it contains a request for waiver of Sections 21.902(i)(1) and 74.903(b) requiring analysis of areas beyond the PSA boundary. Even if there

²¹(...continued)

(same); *Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service*, 10 FCC Rcd 2907, 2917 (1995) (expanding PSA to 35 miles); *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service; and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Memorandum and Order on Reconsideration*, 1 CR 1, 13 (1995) ("significant advantages accrue when all MDS and ITFS channels in a single wireless cable system are equally protected"); and *Two-Way Order* at 19,173, n.296 (granting all ITFS stations a PSA). In the BellSouth Petition, BellSouth has urged the Commission to adopt rules stating that point-to-point ITFS stations should not be afforded PSAs. See BellSouth Petition at 12-14.

are no ITFS receive sites in the relevant area(s), the additional time and effort expended to arrive at that conclusion would be substantial and burdensome.

The Commission should reject CTN's efforts to permit waivers of the rules limiting ITFS receive site protection to the 35-mile PSA.


Conclusion

In view of the foregoing, BellSouth urges the Commission to adopt the proposed rule and policy changes discussed in the BellSouth Petition and above.

Respectfully submitted,

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February 10, 2000

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APPENDIX A

1. Section 21.913(b) is amended to read as follows:

(b) A licensee or conditional licensee of an MDS station, or the capacity lessee of such MDS station upon the written consent of the licensee or conditional licensee, may secure a license for a high-power signal booster station that has a maximum EIRP in excess of $-9 \text{ dBW} + 10 \log(X/6) \text{ dBW}$ where X is the channel width in MHz, if it complies with the out-of-band emission requirements of §21.908. Any licensee of a high-power booster station that is a capacity lessee shall, upon termination or expiration of the capacity lease, automatically assign the booster station license to the licensee or conditional licensee of the MDS station by and upon written notice to the Commission signed by the lessee and such licensee or conditional licensee. The applicant for a high-power station, or for modification thereto, where not subject to §21.41 or §21.42, shall file FCC Form 331 with Mellon Bank, and certify on that form that the applicant has complied with the additional requirements of paragraph (b) of this section, and that the interference data submitted under this paragraph is complete and accurate. Failure to certify compliance and to comply completely with the following requirements of paragraph (b) of this section shall result in dismissal of the application or revocation of the high-power MDS signal booster station license, and may result in imposition of a monetary forfeiture. The applicant additionally is required to submit to the Commission's copy contractor (and to the Commission upon staff request), both in hard copy, and on sequential 3.5" DSHD computer diskettes in a form to be specified by the Commission by public notice, duplicates of the Form 331 filed with Mellon Bank, and the following information:

* * *

(8) If the applicant is a capacity lessee, a certification that: (i) the licensee or conditional licensee has provided its written consent to permit the capacity lessee to apply for the booster station license; and (ii) the applicant and the licensee or conditional licensee have entered into a lease that is in effect at the time of such filing.

2. Section 21.913(e) is amended to read as follows:

(b) ~~Eligibility for~~ A licensee or conditional licensee of an MDS station, or the capacity lessee of such MDS station upon the written consent of the licensee or conditional licensee, shall be eligible to install and operate a low-power signal booster station that has a maximum EIRP of $-9 \text{ dBW} + 10 \log(X/6) \text{ dBW}$ where X is the channel width in MHz, ~~shall be restricted to a licensee or conditional licensee.~~ A low power MDS signal booster station may operate only on one or more MDS channels that are licensed to the licensee of the MDS booster station, but may be operated by a third party with a fully-executed lease or consent agreement with the MDS licensee or conditional licensee. Any licensee of a low-power booster station that is a capacity lessee shall, upon termination or expiration of the capacity lease, automatically assign the booster station license to the licensee or conditional licensee of the MDS station by and upon written notice to the Commission signed by the lessee and such licensee or conditional licensee. An MDS

~~licensee, or conditional licensee, or capacity lessee thereof~~ may install and commence operation of a low-power MDS signal booster station for the purpose of retransmitting the signals of the MDS station or for originating signals. Such installation and operation shall be subject to the condition that for sixty (60) days after installation and commencement of operation, no objection or petition to deny is filed by the licensee of a, or applicant for a previously-proposed, cochannel or adjacent channel ITFS or MDS station with a transmitter within 8.0 kilometers (5 miles) of the coordinates of the low-power MDS signal booster station. An MDS licensee, ~~or conditional licensee, or capacity lessee thereof~~ seeking to install a low-power MDS signal booster station under this rule must, within 48 hours after installation, submit FCC Form 331 to the Commission in Washington, D.C., and submit to the Commission's copy contractor (and to the Commission upon staff request), both in hard copy, and on sequential 3.5" DSHD computer diskettes in a form to be specified by the Commission by public notice, duplicates of the Form 331 filed with Mellon Bank, and the following (which also shall be submitted to the Commission only upon Commission staff request at any time):

* * *

(4)(viii) The ~~MDS conditional licensee or licensee~~ applicant understands and agrees that in the event harmful interference is claimed by the filing of an objection or a petition to deny, ~~the conditional licensee or licensee~~ it must terminate operation within two (2) hours of notification by the Commission, and must not recommence operation until receipt of written authorization to do so by the Commission; and

(ix) If the applicant is a capacity lessee, a certification that: (A) the licensee or conditional licensee has provided its written consent to permit the capacity lessee to apply for the booster station license; and (B) the applicant and the licensee or conditional licensee have entered into a lease that is in effect at the time of such filing.

3. Section 74.985(b) is amended to read as follows:

(b) A licensee or ~~conditional licensee~~ permittee of an ITFS station, or the capacity lessee of such ITFS station upon the written consent of the licensee or permittee, may secure a license for a high-power signal booster station that has a maximum EIRP in excess of $-9 \text{ dBW} + 10 \log(X/6) \text{ dBW}$ where X is the channel width in MHz, if it complies with the out-of-band emission requirements of §21.908. Any licensee of a high-power booster station that is a capacity lessee shall, upon termination or expiration of the capacity lease, automatically assign the booster station license to the licensee or permittee of the ITFS station by and upon written notice to the Commission signed by the lessee and such licensee or permittee. The applicant for a high-power station, or for modification thereto, shall file FCC Form 331 with the Commission in Washington, D.C., and certify on that form that the applicant has complied with the additional requirements of paragraph (b) of this section, and that the interference data submitted under this paragraph is complete and accurate. Failure to certify compliance and to comply completely with the following requirements of paragraph (b) of this section shall result in dismissal of the application or

revocation of the high-power ITFS signal booster station license, and may result in imposition of a monetary forfeiture. The applicant additionally is required to submit to the Commission's copy contractor (and to the Commission upon staff request), both in hard copy, and on sequential 3.5" DSHD computer diskettes in a form to be specified by the Commission by public notice, duplicates of the Form 331 filed with Mellon Bank, and the following information:

* * *

(8) If the applicant is a capacity lessee, a certification that: (i) the licensee or permittee has provided its written consent to permit the capacity lessee to apply for the booster station license; and (ii) the applicant and the licensee or permittee have entered into a lease that is in effect at the time of such filing.

4. Section 74.985(e) is amended to read as follows:

(b) Eligibility for A licensee or permittee of an ITFS station, or the capacity lessee of such ITFS station upon the written consent of the licensee or permittee, shall be eligible to install and operate a low-power signal booster station that has a maximum EIRP of -9 dBW + 10 log(X/6) dBW where X is the channel width in MHz, shall be restricted to a licensee or conditional licensee. A low power ITFS signal booster station may operate only on one or more ITFS channels that are licensed to the licensee of the ITFS booster station, but may be operated by a third party with a fully-executed lease or consent agreement with the ITFS licensee or conditional licensee or permittee. Any licensee of a low-power booster station that is a capacity lessee shall, upon termination or expiration of the capacity lease, automatically assign the booster station license to the licensee or permittee of the ITFS station by and upon written notice to the Commission signed by the lessee and such licensee or permittee. An ITFS licensee, permittee or conditional licensee, or capacity lessee thereof may install and commence operation of a low-power ITFS signal booster station for the purpose of retransmitting the signals of the ITFS station or for originating signals. Such installation and operation shall be subject to the condition that for sixty (60) days after installation and commencement of operation, no objection or petition to deny is filed by the licensee of a, or applicant for a previously-proposed, cochannel or adjacent channel ITFS or MDS station with a transmitter within 8.0 kilometers (5 miles) of the coordinates of the low-power ITFS signal booster station. An ITFS licensee, permittee or conditional licensee, or capacity lessee thereof seeking to install a low-power ITFS signal booster station under this rule must, within 48 hours after installation, submit FCC Form 331 to the Commission in Washington, D.C., and submit to the Commission's copy contractor, (and to the Commission upon staff request), both in hard copy, and on sequential 3.5" DSHD computer diskettes in a form to be specified by the Commission by public notice, duplicates of the Form 331 filed with Mellon Bank, and the following (which also shall be submitted to the Commission only upon Commission staff request at any time):

* * *

(4)(viii) The ~~HTFS conditional licensee or licensee~~ applicant understands and agrees that in the event harmful interference is claimed by the filing of an objection or a petition to deny, ~~the conditional licensee or licensee~~ it must terminate operation within two (2) hours of notification by the Commission, and must not recommence operation until receipt of written authorization to do so by the Commission; and

(ix) If the applicant is a capacity lessee, a certification that: (A) the licensee or permittee has provided its written consent to permit the capacity lessee to apply for the booster station license; and (B) the applicant and the licensee or permittee have entered into a lease that is in effect at the time of such filing.

CERTIFICATE OF SERVICE

I, Victor Onyeoziri, with the law firm of Rini, Coran & Lancellotta, P.C., do hereby certify that the foregoing "Consolidated Opposition To Petitions for Further Reconsideration" of BellSouth Corporation and BellSouth Wireless Cable, Inc. was served on the below-listed parties by First Class U.S. Mail this 10th day of February, 2000.

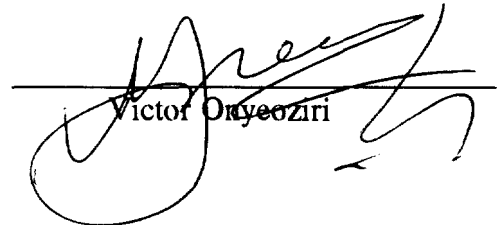
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